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No. 90-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM B. YOUNG, JR., et al.,

Petitioners,

vs.

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The administrators of the New York City subway system have determined that begging in the subway system is inconsistent with the subways' purpose of providing a safe and convenient means of travel because begging in the subways is intimidating and harassing behavior, and therefore have adopted a regulation prohibiting begging in the subways. Certain activity protected by the First Amendment which does not have such effects, such as solicitation by charitable organizations, is permitted in the subways. The question presented by this case is:

Does the First Amendment require the federal courts to overrule the decision of the administrators of the New York City subways that prohibiting begging in the New York City subways, where such conduct is experienced as transgressive behavior, is an effective means of promoting safety and convenience in the subways? The court below answered the question in the negative.

STATEMENT PURSUANT TO RULE 29.1

The Port Authority of New York and New Jersey is a bi-State agency created in 1921 by a Congressionally-consented-to Compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney 1979); N.J.S.A. 32:1-1 to -24 (West 1963).

The Port Authority was named as a defendant below because of its ownership and operation of two facilities of commerce in New York City, the Port Authority Bus Terminal and the World Trade Center. Petitioners claimed that they begged in those facilities from time to time. The Port Authority has a continuing interest in this case inasmuch as the decision below addresses the scope of a government agency's authority to adopt rules and regulations with respect to the use of facilities of commerce open to the public.

The Port Authority has no subsidiaries other than the Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary.

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OPINIONS BELOW

The opinion of the Court of Appeals (Petition Appendix A) is reported at 903 F.2d 146 (2d Cir. 1990). The opinion of the District Court (Petition Appendix B) is reported at 729 F. Supp. 341 (S.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1990. Petitions for Rehearing with Suggestions for

Rehearing En Banc were timely filed and were denied on July 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved are set forth in the Petition at page 2.

STATEMENT OF THE CASE

The Court is respectfully referred to the statement of the case set forth in the opinion of the Court of Appeals, which is reproduced at pages 4 through 15 of Appendix A to the Petition.[1]

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari in the instant case should be denied because the decision below upholding the validity of a ban on begging in the New York City subways is correct and is not in conflict with any decision of this Court or of any other federal appellate court.

This Court has described the nature and purpose of the First Amendment as follows:

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v United States*, 354 US 476, 484 (1957); *New York Times Co. v Sullivan*, 376 US

[1] Hereinafter, references to parts and pages of the Appendix to the Petition for a Writ of Certiorari will be in the form "[Letter] [Number]."

> 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v Louisiana*, 379 US 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection. *NAACP v Claiborne Hardware Co.*, 458 US 886, 913 (1982); *Carey v Brown*, 447 US 455, 467 (1980)." *Connick v Myers*, 461 U.S. 138, 145 (1984).

Under the decision below, Petitioners' ability to make statements regarding the social and political causes and effects of homelessness with respect to themselves and others is not affected. The only effect of the decision below is to recognize the right of the New York City Transit Authority, the operator of the New York City subway system, to prohibit the act of begging, based on the finding that such conduct is inconsistent with the public transit function which the subways are intended to serve. Assuming *arguendo* that begging possesses some communicative nature, the Court of Appeals held that the ban on begging in the subways is a valid regulation affecting conduct that has an incidental effect on expression (A 25-35).[2] This analysis is correct and fully consistent with the decisions of this Court and other federal courts. Accordingly, the petition for a writ of certiorari should be denied.

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[2] The Court of Appeals also indicated that the ban on begging in the subways would be lawful as a valid regulation of conduct with no effect on expressive activity (A 15-25), and would be lawful as a valid regulation of expressive activity in a non-public forum (A 35-37). Contrary to the arguments contained in the petition for a writ of certiorari, these alternative analyses are not proper bases for the issuance of a writ because they were not necessary to the decision of the court below.

(Footnote continued)

ARGUMENT

THE DECISION OF THE COURT OF APPEALS THAT THE BAN ON BEGGING IN SUBWAYS IS A VALID REGULATION EVEN IF IT HAS AN INCIDENTAL EFFECT ON EXPRESSION IS CORRECT AND IS NOT INCONSISTENT WITH THE DECISIONS OF THIS COURT OR ANY OTHER FEDERAL COURT.

Petitioner's claim that the Second Circuit erred in holding that the ban on begging in the subways is a lawful restriction of conduct with an incidental effect on expression rests upon the allegation that the Second Circuit misapplied the test for judging the validity of such restrictions set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), as elucidated in *Ward v. Rock Against Racism*, ____U.S.____ , 109 S.Ct. 2746 (1989). In fact, it is Petitioners who misinterpret *O'Brien* and *Ward*.

The Transit Authority's adoption of a ban on begging reflects its role as the agency responsible for articulating and attempting to achieve the governmental interests to be served by the operation of the New York City subway system.

The Transit Authority's role is profound indeed. It is charged with maintaining the highest practicable level of comfort and safety for its patrons in a unique environment:

> "The New York City Subway System transports approximately 3,500,000 passengers on an average work-day, operates twenty-four hours a day, seven

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Furthermore, these alternative analyses are not worthy of this Court's review because they are correct and consistent with the decisions of this Court and of other federal courts for the reasons set forth in the decision below.

> days a week, and consists of 648 miles of track, 468 subway stations and over 6,000 subway cars. Many parts of the subway system are almost one hundred years old. In a timeworn routine of New York City life, each day a multitude descends the steep and long staircases and mechanical escalators to wait on narrow and crowded platforms bounded by dark tunnels and high power electrical rails." (A 7).

In 1988, the Transit Authority began a lengthy study process to determine the "quality of life" problems experienced by subway riders. The study disclosed the fact that begging contributes to a perception of the subways as a place that is fraught with danger. A research survey conducted as part of the study process revealed that two-thirds of the subway riders have been intimidated into giving money to beggars, and beggars were perceived by riders as a problem pervading the system. These survey results were supported in the record below by the observations of Detective Bernard Jacobs, a twenty-four year veteran of the Transit Authority Police, who reported that many passengers have complained that demands for money by beggars and panhandlers include "unwanted touching, detaining, impeding and intimidating" behavior. Detective Jacobs also stated that "it is difficult from the police perspective to draw the fine line between panhandling and extortion." (A 7-8).

An outside consulting company retained during the study process confirmed the finding that begging and panhandling in the subway system generates high levels of fear in passengers. Subway passengers experience begging differently than street pedestrians because of the inability of "captive" subway passengers to control their movements away from intimidating circumstances when in the crush

of riders in a crowded subway car, when waiting on a platform, or when navigating a maze of mezzanines, stairways and ramps. In addition, the president of the consulting company concluded that begging presents the serious potential of causing accidents and injuries because begging is often disruptive and startling. Moreover, he relied upon the incidence of homeless people who have died in the subways, an average of six persons per month during a ten-month period in 1989, including fifteen persons who were struck by trains, to support the conclusion that the homeless people should not be encouraged to beg and panhandle in the subways for their own well-being (A 8).

The New York City Transit Authority, in the performance of its role as administrator of the subway system, adopted the regulations at issue to improve the level of safety and comfort for patrons of the subway system, consistent with the authority the Transit Authority enjoys as administrator of the subway system.

The test for determining the validity of regulations having an incidental effect on First Amendment interests that was set forth by this Court in *O'Brien*, and which was quoted almost verbatim in the decision below of the Court of Appeals (A 26), is as follows:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. at 377.

This test is "little, if any, different from the standard applied to time, place or manner restrictions." *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 298 (1984).

Petitioners do not claim that the Court of Appeals erred in ruling that the first and second parts of the *O'Brien* test are satisfied by the regulations at issue (A 27-28), *i.e.*, that the Transit Authority has the power to enact regulations governing conduct in the subway system and that a ban on begging furthers an important or substantial governmental interest.

Petitioners do, however, contend that the Court of Appeals misapplied the third part of the test. Specifically, they claim that the regulations are not "content-neutral" since they afford preferential treatment to the expression of some views on a particular subject. This contention is incorrect. The regulation at bar is clearly content-neutral since, in the words of *O'Brien*, the government interest being protected is unrelated to expression. Here, the regulation in question is directed at the non-communicative effects of begging. As held in *Ward v. Rock Against Racism*, 109 S.Ct. at 2754, "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages . . . ."[3]

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[3] The regulation at bar is also clearly distinguishable from the one struck down in *Ass'n of Community Organizations For Reform Now v. Municipality of Golden*, 744 F.2d 739 (10th Cir. 1984). *Golden* struck down an anti-canvassing ordinance which allowed an exemption for activity conducted for a charitable, religious, patriotic or philanthropic purpose or to provide a product or service necessary to the general welfare. *Id.*, at 742 n.1. The regulation was held to be invalid because it granted the City Council unbridled discretion to grant exemptions, *id.*, at 747, and because the City Council exemption process inquired as to the content of the message delivered by canvassers. *Id.*, at 744. In this case, there is no such grant of discretion, and no such inquiry.

The regulation at bar is content neutral under *Ward* because its purpose is to improve the level of safety and comfort enjoyed by subway riders, not to suppress any opinion. The regulation has neither the purpose nor the effect of prohibiting the dissemination of any opinion on any subject.

Petitioners further contend that the Second Circuit misapplied the fourth part of the *O'Brien* test, *i.e.*, the requirement that an incidental restriction on alleged First Amendment interests be no greater than is essential to the furtherance of the governmental interest involved. According to Petitioners, the fourth part of the *O'Brien* test, as clarified by *Ward*, has two requirements: First, a regulation must promote a government interest that would be achieved less effectively without the regulation; and second, the regulation must avoid burdening substantially more speech than necessary to further the governmental interest (Petition at 22). This contention is fatally flawed because it reflects a total misunderstanding of the language and reasoning of *Ward*.

This Court held in *Ward* that,

> "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' *To be sure*, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests." 109 S.Ct. at 2758 (citations omitted, ellipsis in internal quotation in original, emphasis added).

The "To be sure" phrase makes it clear that the second sentence is an alternative statement of the principle stated in the first sentence, and does not create an additional hurdle to be overcome.

Significantly, *Ward* rejected an interpretation of "narrowly tailored" which would require a regulation to be the *least* restrictive means of achieving a government interest. In this regard, *Ward* explicitly reaffirmed this Court's determination in *Clark v. Community For Creative Non-Violence*, *supra*, that the narrowly tailored standard does not permit a court to usurp a government agency's authority to administer the facilities under its control because less restrictive means of achieving a goal may be imagined by the court. 109 S.Ct. at 2757.

More specifically, *Ward* reversed a judgment of the Second Circuit invalidating a New York City regulation requiring bands playing in the Central Park Bandshell to use a City sound system operated by a City employee. In reversing, this Court held that the Second Circuit had failed to give sufficient deference to the City's determination as to how to control the volume of Bandshell performances. *Id.*, at 2759. Instead of deferring to the City, the Second Circuit relied on hypothetical, less restrictive volume control alternatives, which reflected "nothing more than a disagreement with the city over how much control of volume is appropriate or how that level is to be achieved." *Id.*, at 2757, 2759. In the instant case, the Second Circuit followed *Ward* by holding that the District Court had erred by substituting its judgment for that of the New York City Transit Authority (A 33).

Clark v. Community For Creative Non-Violence, *supra*, the case upon which *Ward* relied, further demonstrates Petitioners' error. *Clark* held that the District of Columbia Circuit Court of Appeals had erred in striking down a United States Parks Service rule prohibiting overnight sleeping in certain Washington parks to preserve park lands from damage. According to this Court, the District of Columbia Circuit erred in holding the rule invalid "because there [were] less speech-restrictive alternatives that could

have satisfied the Government interest in preserving park lands." 468 U.S. at 299. This Court held that the narrowly tailored test was satisfied because preventing overnight sleeping "will avoid a measure of actual or threatened damage to [parks]". *Id.* *Clark* expressly relied upon the principle that the Parks Service, rather than the courts, should determine the level of protection to give to park land, and the best method of achieving that level of protection. *Id.*

The decision below is consistent with the mandate of *Ward* and *Clark*. The court below held that it was for the New York City Transit Authority, not the courts, to determine the level of comfort, safety and convenience which should be maintained in the subways, and the Transit Authority could validly determine that no limitation on begging other than a complete ban would effectively achieve a satisfactory level of service (A 34-35).

In short, Petitioners' claim that a prohibition of begging is unnecessary to achieve valid New York City Transit Authority goals does not raise a valid constitutional claim, but merely reflects a policy disagreement over how much protection the subways require, or a factual disagreement over how an acceptable level of protection is to be attained.

Finally, a review of the circuit courts of appeals decisions applying *Ward* that are discussed by Petitioners does not reveal any conflict with respect to the meaning of *Ward*. Those cases are merely applications of *Ward* to varying factual settings different from the one at bar.

Collinson v. Gott, 895 F.2d 994 (4th Cir. 1970), does not involve an application of *Ward* at all. The question addressed in *Collinson* was the nature of a public meeting presiding officer's immunity. *Id.*, at 997. *Ward* was discussed only in passing in one of three opinions concurring in the judgment. *Id.*, at 1003.

Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989), held that *Ward* grants the presiding officer of a public meeting latitude in making a "judgment call" in ruling a person out of order. *Id.*, at 1334.

Doe v. City of Minneapolis, 898 F.2d 612 (8th Cir. 1990), held that *Ward* permits a ban on doors on motion picture viewing booths in adult bookstores as a narrowly tailored means of reducing the incidence of AIDS. *Id.*, at 619.

Community For Creative Non-Violence v. Turner, 893 F.2d 1387 (D.C. Cir. 1990), struck down a permit requirement for engaging in First Amendment activity at Washington Metro stations, which was so broad as to apply to the wearing of a T-shirt with a political slogan. *Id.*, at 1392. Thus, the result turned on the breadth of the regulation, rather than on particular language in *Ward*. There is no conflict between the decision below and *Turner* since *Turner* involved regulations affecting the entire range of First Amendment activity, and the decision below addressed only restrictions on begging.

Accordingly, the decision by the Court of Appeals that the ban on begging in subways is a valid regulation even if it has an incidental effect on expression is both clearly correct and fully consistent with the decisions of this Court and other federal courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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